Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term 1997

JAMES O. HENDERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

John B. Hinton
Kreis & Hinton, LLP
6901 Emerald, Suite 207
Boise, Idaho 83704
(208) 345-0200

Leo N. Griffard, Jr.
Counsel of Record
P.O. Box 170199
Boise, Idaho 83717
(208) 331-0610

Attorneys for Petitioner

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QUESTION PRESENTED

Where is "home" within the meaning of 26 U.S.C. §162(a)(2) which permits an income tax deduction to taxpayers for business travel while "away from home."

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Petitioner, James O. Henderson, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Henderson v. Commissioner of Internal Revenue*, 143 F.3rd 497 (9th Cir. 1998) (App. A). The opinion of the tax court in *Henderson v. Commissioner* may be found at 70 TCM (CCH) 1407 (1995) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on April 29, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 162(a)(2) of the Internal Revenue Code provides as follows:

> 162(a) In general.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

> ...(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;
>
> 26 USC § 162(a)(2).

STATEMENT OF THE CASE

1. Proceedings in the Tax Court.

A trial was held before the United States Tax Court on June 19, 1995. The Tax Court had subject matter jurisdiction pursuant to 26 U.S.C. §7442.

The issue before the Tax Court was whether Petitioner, James O. Henderson, had $1,791 of additional income tax liability due for 1990. Such amount resulted from the disallowance by Respondent, the Commissioner of Internal Revenue, of deductions for travel expenses. (App. A at 1a; App. B at 1b-2b).

2. Factual Background.

The Appellant, James O. Henderson, lived in Boise, Idaho with his parents, except while working out of state during much of the 1990 calendar year. While travelling, Mr. Henderson still maintained significant personal contacts with Idaho. He was registered to vote in Idaho; he paid Idaho state income tax; he had an Idaho driver's license; he maintained his bank account in Idaho; he received mail there and kept belongings in Idaho, including his dog. (App. A at 1a).

Also during 1990, Mr. Henderson worked for Walt Disney's World of Ice, a traveling show. He was employed

on a tour-by-tour basis. The tours would stop in each city for a few days or weeks. At the end of the year Mr. Henderson had been employed on three tours involving travel to thirteen different states and Japan. (App. A at 1a-2a).

During the time when Mr. Henderson was not employed on one of these tours he returned to Boise, Idaho spending two to three months there living with his parents. (App. A at 1a-2a).

The IRS disallowed Mr. Henderson's travel expense deductions from 1990 based on it's position that such amounts did not represent expenses for "travel while away from home" pursuant to Section 162(a)(2) of the Internal Revenue Code, because Petitioner's residence in Boise, Idaho did not qualify as his "Tax Home". (App. A at 1a; App. B at 1b).

3. Proceedings Below.

The tax court issued an Opinion on November 27, 1995 affirming the Commissioners disallowance of travel deductions. Petitioner Appealed.

The Ninth Circuit Court of Appeals issued an Opinion on April 29, 1998 affirming the tax court. The Court of Appeals concluded that Petitioner did not have a tax home at all. The Court of Appeals defined "home" to require duplication or actual expenditure of living expenses at the home location. (App. A at 3a-4a). Based on this definition, the Court of Appeals affirmed the Tax Court's determination that Mr. Henderson had no tax home, because he lived rent free with his parents. Judge Kozinski disagreed with this definition of "home" and issued a dissenting opinion (App. A at 7a-9a) (Kozinski, J. dissenting).

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE DEFINITION OF A TAXPAYER'S "HOME" IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT

The Petition should be granted because it represents an important federal question that should be decided by this Court. The question is important for three reasons: (1) The importance of this question was suggested by this Court in *Commissioner v. Flowers*, but specifically left open until now; (2) the question involves the construction of a federal statute impacting all persons who engage in business travel; and (3) the construction of the statute given by the Court of Appeals unnecessarily penalizes traditional family living arrangements.

1. Definition of "Tax Home" Left Open by This Court in *Commissioner v. Flowers*[1]

This court discussed the deduction of travel expenses in *Commissioner v. Flowers*, 326 U.S. 465 (1946). In *Flowers* this Court suggested the importance of the "tax home" definition but resolved the case on other grounds and left open the question until now. This issue is now squarely presented by this Petition.

Flowers held that to qualify for the deduction of travel expenses, a taxpayer must meet three requirements: (1) the travel expenses must be reasonable and necessary; (2) be incurred by the taxpayer while away from home; and (3) be incurred while in the pursuit of a trade or business. *Flowers*, 326 U.S. 465, 470 (1946).

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[1] 326. U.S. 465 (1946).

At issue in *Flowers* were the last *two* requirements. The taxpayer in *Flowers* was a lawyer who lived in Mississippi and worked in Alabama. This Court found that the travel expenses did not satisfy the third requirement for deduction because they were not incurred while in pursuit of business. Thus, this Court did not have to reach the definition of "home" used in the second requirement, although it noted its importance:

> The meaning of the word "home"... with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation... The Tax Court and the administrative rulings have consistently defined it as the equivalent of the taxpayer's place of business....On the other hand, the decision below and *Wallace v. Commissioner*, 9 Cir., 144 F.2d 407, have flatly rejected that view and have confined the term to the taxpayer's actual residence...We deem it unnecessary here to enter into or to decide this conflict.
>
> *Flowers*, 326 U.S. at 471-472.

Thus, the conflict avoided in *Flowers* is now squarely before this Court and in need of resolution. The present case involves only the tax home issue, (App. A at 2a).

The concept of a tax home is derived from the language of Section 162(a)(2) which allows a deduction for all ordinary and necessary traveling expenses "while away from home" in the pursuit of a trade or business. 26 U.S.C. §162(a)(2). This language necessitates a legal mapping of the location of one's "home" before travel may be said to be "away from" that home.

Although the location of ones home is a factual determination, the legal definition of 'home" remains unresolved by this Court as noted above.

2. Impact on Workers Whose Jobs Require Travel

The definition of "tax home" impacts everyone who engages in business travel. As noted by Circuit Judge Kozinski in his dissenting opinion in this case, "Fast planes and automobiles have turned us into a nation of itinerants." (App. A at 8a). Common experience reveals that business-related travel has increasingly become a part of the work place. Associated with this travel are travel expenses from hotels, plane and cab fares, rental cars, meals and the like.

For purposes of deduction of travel expenses, the determination of a person's tax home is a necessity. Regrettably, this determination remains ambiguous. As discussed above, the definition of tax home was a question specifically reserved by this Court in *Commissioner v. Flowers*, 326 U.S. 465 (1946). Moreover, in the words of Judge Kozinski, there is a "dearth of authority" on this issue. (App. A at 9a).

3. Penalty on Family Relationships

The definition of "tax home" as given by the Court of Appeals adversely impacts family relationships. Such relationships often involve some family members providing housing and living expenses for others. The Court of Appeals penalizes these individuals by denying travel expense deductions, because the expenses are not "duplicated." Other subsidized living arrangements would be similarly effected, including for example, living expenses paid under many trust arrangements commonly used in estate planning.

These results are inconsistent with the fundamental principle of taxation—cited by the Court of Appeals[2]—*that the cost of producing income is deductible from a persons taxable income.* The inconsistency is apparent from the simple observation that every person who spends a dollar on a business travel expense has spent the same amount of out-of-pocket expense to produce income, regardless of whether the person pays rent or lives rent free with their parents.

Neither the statute, nor tax policy, requires the home and family to be separated in the way favored by the Court of Appeals. As stated by the dissenting member, Judge Kozinski, "Leave it to the IRS to turn a family reunion into a taxable event." (App. A at 9a).

The legal definition of "home" used by the Court of Appeals leaves the Petitioner, Mr. Henderson, without a tax home at his personal residence. This definition also leaves him without a tax home *anywhere*: his job location changed every few days or weeks, making it impossible for Mr. Henderson to have a tax home near his business location. For tax purposes, he would be homeless.

In contrast to the Court of Appeals formulation requiring actual duplication of expenses, if this Petition is granted, the Petitioner will urge a legal definition of "home" that asks whether under all circumstances, a taxpayer could reasonably be expected to move his or her residence to the location of employment. Such a test would be in keeping with the principle advanced in *Flowers* that the exigencies of business, rather than the personal conveniences and necessities of the traveler, must be the motivating factors for the deduction of travel expenses.
See 326 U.S. 465, 474.

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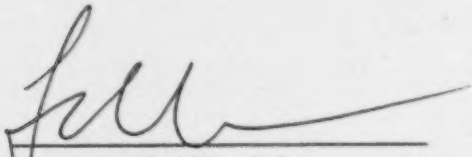
[2] App A at 3a.

CONCLUSION

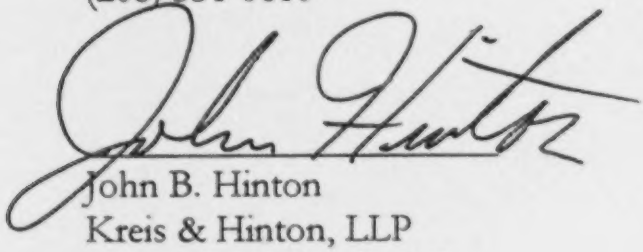
The Petition should be granted because it represents an important federal question that should be decided by this Court. The importance of this question was suggested by this Court in *Commissioner v. Flowers*, but specifically left open until now. The meaning of "home" for tax purposes is of consequence to the many persons who engage in business travel. A sensible legal definition should bring "home" traditional notions of family and sound tax policy.

Accordingly, James O. Henderson respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted



Leo N. Griffard, Jr.
Counsel of Record
P.O. Box 170199
Boise, Idaho 83717
(208) 331-0610



John B. Hinton
Kreis & Hinton, LLP
6901 Emerald, Suite 207
Boise, Idaho 83704
(208) 345-0200

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 29, 1998

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES O. HENDERSON, *Petitioner-Appellant,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*	No. 96-70164 Tax Ct. No. 12692-94 OPINION

Appeal from a Decision of the
United States Tax Court

Argued and Submitted
August 7, 1997—Seattle, Washington

Filed April 29, 1998

Before: Dorothy W. Nelson, Charles Wiggins, and
Alex Kozinski, Circuit Judges.

Opinion by Judge Wiggins; Dissent by Judge Kozinski

SUMMARY

Tax/Income

The court of appeals affirmed a decision of the tax court. The court held that under Internal Revenue Code (IRC) § 162(a)(2), a taxpayer who works in a touring entertainment business throughout the year cannot claim a deduction for "away from home" travel expenses.

When he was not working in 1990, appellant James Henderson lived rent-free in Boise, Idaho with his parents. Henderson was a stage hand for a traveling ice show. He worked on a tour-by-tour basis, and lived for a total of two or three months at his parents' residence, in which he had no interest.

On his federal income tax return for 1990, Henderson claimed deductions under § 162(a)(2) for living expenses he incurred while away from Boise. The IRS disallowed the deduction on the ground that Henderson had no legal tax home for purposes of § 162(a)(2), and assessed a deficiency.

In the tax court, Henderson contended that because his home was Boise, he was entitled to the deduction. The tax court concluded that Boise was not Henderson's tax home because his choice to live there had nothing to do with the needs of his work. Henderson appealed.

[1] To qualify for the "away from home" deduction, the Supreme Court has held that the taxpayer's expenses must be reasonable and necessary, incurred while away from home, and incurred while in the pursuit of a trade or business. [2] If Henderson established that this home was in Boise, his reasonable travelling expenses on the tours were deductible.

[3] For purposes of § 162(a)(2), "home" does not have its usual and ordinary meaning. "Home" means the taxpayer's abode at his or her principal place of employment. If a taxpayer has no regular principal place of business, he may be able to claim his place of abode as his tax home. [4] However, a taxpayer may have no tax home if he continuously travels and thus does not duplicate substantial, continuous living expenses for a permanent home maintained for some business reason. If a taxpayer has no "home" for tax purposes, he cannot deduct for expenses incurred while "away from home."

[5] Factors to consider in determining whether a taxpayer has a tax home or is an itinerant are the business connection

to the locale of the claimed home; the duplicative nature of the living expenses while traveling and at the claimed home; and personal attachment to the claimed home. While subjective intent can be considered, objective financial criteria are usually more significant.

[6] Henderson had virtually no business reason for his tax home to be in any location. His choice to return to Boise was not dictated for business reasons. While his reasons for returning may have been understandable, it could not be said that the tax court clearly erred in concluding that they were personal, not business, reasons. [7] Henderson did not have substantial, continuing living expenses in Boise that were duplicated by his expenses on the road. [8] That Henderson may have incurred higher expenses while traveling than he would have if he had obtained a full-time job in Boise was not dispositive. The issue was whether his claimed expenses were incurred while he was away from his tax home.

[9] The tax court did not clearly err when it discounted Henderson's evidence on personal attachment to Boise. A taxpayer may treat a personal residence as his tax home even if it is not the same as his place of temporary employment with a certain employer. However, this principle did not help Henderson because he could not establish any non-de minimis business connection to Boise to justify the position that it was his permanent tax home.

Judge Kozinski dissented, concluding that Henderson was entitled to the deduction because his itinerate work forced travel expenses on him that he could not have avoided by moving his home closer to his job.

COUNSEL

John Hinton, Boise, Idaho, for the petitioner-appellant.

Gilbert S. Rothenberg, Assistant Attorney General, Washington, D.C., and Tamara S. Schottenstein, Assistant Attorney General, Washington, D.C., for the respondent-appellee.

OPINION

WIGGINS, Circuit Judge:

We must decide whether a taxpayer may claim Boise, Idaho as his "tax home" for the 1990 tax year even though virtually all of his work that year was for a traveling ice show. James Henderson claimed deductions under Internal Revenue Code § 162(a)(2) for living expenses incurred "away from home" while on the tours. The Commissioner disallowed the deductions, concluding that Henderson had no legal tax home for purposes of § 162(a)(2) because he lacked the requisite business reasons for living in Boise between ice show tours. As a result of the disallowance, Henderson had a deficiency in his 1990 federal income tax of $1,791. The Tax Court upheld the Commissioner's decision. We have jurisdiction under 26 U.S.C. § 7482(a), and we affirm.

Henderson's parents lived in Boise, where they had reared him. Even after graduating from the University of Idaho in 1989, he maintained many personal contacts with Boise. For instance, he received mail at his parents' residence, lived there between work assignments, and kept many belongings and his dog there. He also was registered to vote in Idaho, paid Idaho state income tax, maintained an Idaho driver's license, and maintained his bank account in Idaho. During 1990, he spent about two to three months in Boise, staying at his parents' residence. While he was there, he performed a few minor jobs to maintain or improve the family residence.

In 1990, Henderson worked as a stage hand for Walt Disney's World of Ice, a traveling show. His employers' corpo-

rate offices were in Vienna, Virginia. Henderson was employed on a tour by tour basis. He testified that at the end of one tour, he would be contacted about participating in the next one. Following the completion of a tour, he returned to his parents' home in Boise. He worked on three different Disney tours that year. The first lasted from January 1 to May 13, the second from July to November, and the third from December 5 to December 31. He traveled on tour to thirteen states and Japan. The tours stopped in each city for a few days or weeks. While traveling, he received $30 per day to cover expenses.

Henderson claims that he looked periodically for employment in Boise between the tours, but the evidence showed that he worked as a stage hand only for a single ZZ Top concert. The Tax Court found that while he returned to Boise in his "idle time," his source of employment during the tax year had no connection to Boise. On appeal, Henderson contends that his 1990 tax home was Boise, primarily based on his extensive personal contacts there.

[1] Internal Revenue Code § 162(a)(2) allows a deduction for all ordinary and necessary "traveling expenses . . . while away from home in the pursuit of a trade or business." 26 U.S.C. § 162(a)(2). This section embodies "a fundamental principle of taxation"—that the cost of producing income is deductible from a person's taxable income. *Hantzis v. Commissioner,* 638 F.2d 248, 249 (1st Cir. 1981). To qualify for the "away from home" deduction, the Supreme Court has held that the taxpayer's expenses must (1) be reasonable and necessary expenses, (2) be incurred while away from home, and (3) be incurred while in the pursuit of a trade or business. *Flowers v. Commissioner,* 326 U.S. 465, 470 (1946).

[2] The first and third criteria are not at issue. The subject of this appeal is whether the expenses Henderson claims as deductions were incurred while "away from home." If Henderson establishes that his home was Boise, his reasonable

traveling expenses on the Disney tours are deductible. The Tax Court concluded that Boise was not Henderson's tax home because his choice to live there had nothing to do with the needs of his work; thus, the Tax Court held that Henderson could not claim the deduction for traveling expenses incurred while away from Boise. It held that Henderson had no tax home because he continuously traveled for work. We agree.

[3] Henderson builds a strong case that he treated Boise as his home in the usual sense of the word, but "for purposes of [section] 162, 'home' does not have its usual and ordinary meaning." *Putnam v. United States,* 32 F.3d 911, 917 (5th Cir. 1994) ("In fact, 'home'—in the usual case—means 'work.' "). We have held that the term "home" means "the taxpayer's abode at his or her principal place of employment." *Folkman v. United States,* 615 F.2d 493, 495 (9th Cir. 1980); *see also Coombs v. Commissioner,* 608 F.2d 1269, 1275 (9th Cir. 1979) (stating that "tax home" is generally, but not always, exact locale of principal place of employment). If a taxpayer has no regular or principal place of business, he may be able to claim his place of abode as his tax home. *See Holdreith v. Commissioner,* 57 T.C.M. (CCH) 1383 (1989).

[4] A taxpayer may have no tax home, however, if he continuously travels and thus does not duplicate substantial, continuous living expenses for a permanent home maintained for some business reason. *James v. United States,* 308 F.2d 204, 207 (9th Cir. 1962); *Cerny v. Commissioner,* 62 T.C.M. (CCH) 1061, 1062 (1991), *aff'd by unpublished opinion,* 2 F.3d 1156 (9th Cir. 1993).[1] Clearly, if a taxpayer has no

[1]Although perhaps surprising at first blush, this rule is well-established. *See Andrews v. Commissioner,* 931 F.2d 132, 137 (1st Cir. 1991) ("The Commissioner and courts have adhered consistently to this policy that living expenses duplicated as a result of business necessity are deductible, whereas those duplicated as a result of personal choice are not."); *Deamer v. Commissioner,* 752 F.2d 337, 339 (8th Cir. 1985); *Rosenspan v. United States,* 438 F.2d 905, 912 (2d Cir. 1971); *Barone v. Commissioner,* 85 T.C. 462, 465 (1985), *aff'd by unpublished decision,* 807 F.2d 177 (9th Cir. 1986).

"home" for tax purposes, then he cannot deduct under § 162(a)(2) for expenses incurred "away from home." This is for good reason. In *James*, we examined the statutory precursor to the present version of § 162(a) and explained that the deduction was designed to mitigate the burden on taxpayers who travel on business. 308 F.2d at 207. The burden exists "only when the taxpayer has a 'home,' the maintenance of which involves substantial continuing expenses which will be duplicated by the expenditures which the taxpayer must make when required to travel elsewhere for business purposes." *Id.*; *see also Andrews*, 931 F.2d at 135 (emphasizing that the deduction's purpose was to mitigate duplicative expenses); *Hantzis*, 638 F.2d at 253. Thus, a taxpayer only has a tax home—and can claim a deduction for being away from that home—when it appears that he or she incurs substantial, continuous living expenses at a permanent place of residence. *James*, 308 F.2d at 207-08.

[5] Revenue Ruling 73-539, 1973-2 C.B. 37, outlines three factors to consider in determining whether a taxpayer has a tax home or is an itinerant.[2] Essentially, they are (i) the business connection to the locale of the claimed home; (ii) the duplicative nature of the taxpayer's living expenses while traveling and at the claimed home; and (iii) personal attachments to the claimed home. While subjective intent can be considered in determining whether he has a tax home, objective financial criteria are usually more significant. *Barone*, 85 T.C. at 465.

The location of Henderson's tax home is a determination of fact reviewed for clear error. *Frank v. United States*, 577 F.2d 93, 97 (9th Cir. 1978). Similarly, we believe the determination of whether a taxpayer has a tax home or is an itinerant

[2]While Revenue Rulings do not control our decision, they are instructive because they represent the interpretations of the agency responsible for enforcing the tax laws. *See Idaho Ambucare Ctr., Inc. v. United States*, 57 F.3d 752, 756 (9th Cir. 1995).

depends on the facts of each case and should be reviewed for clear error. Considering these factors, the Tax Court did not clearly err when it concluded that Henderson is an itinerant taxpayer.

[6] First, Henderson had virtually no business reason for his tax home to be in any location—he constantly traveled in 1990 as part of his work with the World on Ice tours. His personal choice to return to Boise was not dictated by business reasons. Except for brief intervals, he was employed for the tours. He worked only one night in Boise. While he testified he looked for other work in Boise between tours, he also testified that at the end of each tour he would have a contract talk with the company manager about the next tour. The Tax Court determined that Henderson merely returned to Boise during his "idle time" between tours. While his reasons for returning may be entirely understandable, we cannot say the Tax Court clearly erred in concluding they were personal, not business, reasons. His minimal employment efforts in Boise do not change this analysis.

The importance of the business reason for residing in a certain place is illustrated in *Hantzis*. In that case, the First Circuit disallowed the "away from home" deduction for a law student from Boston who took a summer job in New York. The court held that she did not have a tax home in Boston, even though her husband lived in Boston and she lived there during the school year, because she had no business reason to maintain a home in Boston during the summer while she worked in New York. The court explained why the deduction did not apply in those circumstances:

> Only a taxpayer who lives one place, works another and has business ties to both is in the ambiguous situation that the temporary employment doctrine is designed to resolve. . . . [A] taxpayer who pursues temporary employment away from the location of his usual residence, but has no business connection

with that location, is not "away from home" for purposes of section 162(a)(2).

Hantzis, 638 F.2d at 255.

[7] Second, Henderson did not have substantial, continuing living expenses in Boise that were duplicated by his expenses on the road. The evidence showed that he lived with his parents when he stayed in Boise. The Tax Court found that he paid no rent and had no ownership interest in his parents' home. His financial contributions in Boise were limited. He contributed some labor to maintenance and improvement of the home while he was there, and he paid about $500 for supplies. While his parents may have expended money that benefited Henderson as well—i.e., maintaining a mortgage, paying utilities, and so forth—this is not a substantial living expense incurred by Henderson. Further, any minor expense he may have incurred while living with his parents was not continuing during the periods while he traveled on tour. That is, there is no evidence he had any expenses in Boise while he traveled on the Disney tours.

[8] The fact that Henderson may have incurred higher expenses while traveling with Disney than he would have if he had obtained a full-time job in Boise is not dispositive. The issue presented is whether his claimed expenses were incurred while he was away from his tax home. To assume that Henderson is entitled to the deduction simply because Henderson incurred higher expenses than he would have had he worked in Boise ignores the important question of whether Boise was his tax home at all. Only if Boise is his tax home can Henderson claim deductions for expenses incurred while away from Boise.

[9] Because these two factors weigh against finding that he had a tax home in Boise, the Tax Court did not clearly err when it discounted his evidence on the third factor: personal attachment to Boise. Henderson cites cases, *e.g. Horton v.*

Commissioner, 86 T.C. 589, 593 (1986), which hold that a taxpayer may treat a personal residence as his tax home even if it is not the same as the place of his temporary employment with a certain employer. This principle does not help Henderson, however, because he cannot establish any (non-*de minimis*) business connection to Boise to justify the position that it was his permanent tax home. *See Hantzis*, 638 F.2d at 254-55. Thus, travel away from Boise while on tour with Disney was not travel "away from home" as that term is understood for income tax purposes.

AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

The Tax Code provides that travel expenses are fully deductible, so long as they are incurred while "away from home" in the pursuit of business. I.R.C. § 162(a)(2). Henderson fits comfortably within this language. He lived with his parents in Boise, which made their home his home under any reasonable definition of the term. And he incurred travel expenses in pursuing a job that moved from town to town. Given the itinerant nature of his employment, Henderson could not have avoided these travel expenses by moving his home closer to work. He is thus easily distinguished from the taxpayer in *Hantzis* v. *Commissioner*, 638 F.2d 248 (1st Cir. 1981), who could have avoided the travel expenses altogether by moving closer to her work. *Hantzis*'s extra-statutory requirement that a home is not a "tax home" unless dictated by business necessity has no application when the job itself has no fixed location.

The other reasons offered by the IRS for denying Henderson his traveling expense deduction are not supported by the Code or the regulations, nor do they make any sense. That Henderson's parents did not charge him room and board is of

no consequence. Neither the Code nor common experience requires that a taxpayer pay for his home, else all minors and many in-laws would be deemed homeless. "Home" is not a term of art; it is a common English word meaning a permanent place where a person lives, keeps his belongings, receives his mail, houses his dog—just as Henderson did. Indeed, a grown son living in his parents' house is said to be living "at home." Whether he compensates his parents in cash, by doing chores or through filial affection is none of the Commissioner's business. What matters is that, by going on the road in pursuit of his job, Henderson had to pay for food and lodging that he would not have had to buy had he stayed home.

James v. *United States,* 308 F.2d 204 (9th Cir. 1962), cuts against the government. Despite some imprecise language in the opinion, the facts there were very different. George James was on the road 365 days a year and had *no* permanent home; he spent his entire life traveling from hotel to motel. Wherever a weekend or holiday found him, he would stay there until it came time to go to his next location. James thus was, indeed, a tax turtle—someone with no fixed residence. Henderson is very different: He had a home in Boise, a place where he returned when he wasn't working. He was no more a tax turtle than anyone else who travels a lot for business. That his home happens to be owned by his parents makes it no less his home.[1]

Fast planes and automobiles have turned us into a nation of itinerants. The tradition of families living together in one city, even under one roof, is sadly disappearing. Yet there is virtue

[1] *James*'s emphasis on duplication of expenses is unnecessary to the holding, and mistaken to boot. Duplication is one possible method of sifting out business expenses from personal ones, but not the method chosen by Congress. Section 162(a)(2) requires only that the taxpayer be away from home in pursuit of business; meals, for example, are fully deductible even though the expense is not duplicated back at home.

in keeping families together, in parents who welcome their adult children under their roof. Leave it to the IRS to turn a family reunion into a taxable event. Henderson is being hit with extra taxes because his lifestyle doesn't conform to the IRS's idea of normalcy. But why should the government get extra money because the Hendersons chose to let their son live at home? Had they given him $600 a month to rent an apartment next door, Henderson surely would have gotten the travel deduction. I see no reason why the Henderson family ought to be penalized because the parents gave their son a gift of housing rather than cash—or why the Commissioner should be the beneficiary of this parental generosity. If Congress had said it must be so, I would bow to its wisdom. But Congress said no such thing and I do not feel bound to give the same deference to the Commissioner's litigating position.[2] Given the dearth of authority or common sense supporting the Commissioner's view, we are free to encourage happy family arrangements like those between Henderson and his mom and dad. In the name of family values, I respectfully dissent.

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[2]Revenue Ruling 73-529 is entitled to some deference—exactly how much is unclear—but certainly far less than the statutesque deference we give regulations. *See Estate of McLendon* v. *Commissioner*, 135 F.3d 1017, 1023-24 (5th Cir. 1998); *First Chicago NBD Corp.* v. *Commissioner*, 135 F.3d 457, 459-460 (7th Cir. 1998). Because the Service cannot easily recant a position after a ruling is published, it has reason to be overly stingy in drafting. Institutional pressures may also drive the Service to stretch the language of the Code; it's easier for the Executive Branch to have the Service milk more revenue out of the existing Code than to persuade Congress to amend it. Moreover, unlike most regulations, Revenue Rulings are not subject to the notice-and-comment procedures of the Administrative Procedure Act. Ruling 73-529 sweeps too broadly to be persuasive here: Under the Ruling, Henderson would get no deduction even if he spent ten months a year at home instead of ten weeks, simply because he paid no rent.

APPENDIX B — OPINION OF THE UNITED STATES TAX COURT FILED NOVEMBER 27, 1995

James O. HENDERSON, Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 12692-94.

United States Tax Court.

Nov. 27, 1995.

John B. Hinton, Boise, ID, for petitioner.

Victor A. Ramirez, Mayaguez, PR, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

POWELL, Special Trial Judge:

This case was assigned pursuant to the provisions of section 7443A(b)(3) and Rules 180, 181, and 182. [FN1]

Respondent determined a deficiency in petitioner's Federal income tax for 1990 in the amount of $1,791. At the time the petition was filed, petitioner resided in Las Vegas, Nevada.

After concessions, [FN2] the issue is whether petitioner is entitled to deduct expenses for travel "while away from home" pursuant to section 162(a)(2).

FINDINGS OF FACT

James O. Henderson (petitioner) graduated from college in June 1989 majoring in theatrical arts. Immediately after graduation petitioner was employed by the Oregon Shakespeare Festival for 6 months. During 1990, petitioner was employed as a lighting technician for Walt Disney's World on Ice (World on Ice). World on Ice had its headquarters in Virginia; however, the show toured, stopping in various cities for brief periods of time. Petitioner traveled on three tours during 1990. The first tour lasted from January 1 to May 13, 1990, and included stops in 19 cities in 10 States. The second tour ran from July to November 1990 and consisted of shows exclusively in Japan. The third tour lasted from December 5 to December 31, 1990, and included stops in Washington, Montana, and North Dakota. Petitioner was employed on a tour by tour basis, signing a new employment contract before each tour. While traveling, petitioner received a per diem allowance of $30 for expenses.

When petitioner was on tour he stayed in hotel rooms with other employees. When not on tour petitioner stayed at his parents' house in Boise, Idaho, where he kept his car, dog,

and other belongings. He was registered to vote, was licensed to drive, and paid State income tax in Idaho. Petitioner had no ownership interest in his parents' house and paid no rent. He did perform some work around the house when he was not traveling, including painting, electrical repairs, installing light fixtures with motion sensors, landscaping, and constructing a dog house. Petitioner's sole financial contribution to the household consisted of approximately $500 paid to obtain the supplies needed to perform these activities.

On his 1990 Federal income tax return, petitioner claimed deductions totaling $14,021 for expenses incurred while traveling on the tours. In the notice of deficiency respondent determined that petitioner was not entitled to deduct the traveling expenses because petitioner was not "away from home". Petitioner contends that these expenses are properly deductible as traveling expenses while away from home pursuant to section 162(a)(2), because his home was his parents' house in Boise, Idaho, and his employment was temporary.

OPINION

Section 162(a)(2) allows a taxpayer to deduct traveling expenses, including amounts expended for meals and lodging, if such expenses are (1) ordinary and necessary; (2) incurred while away from home; and (3) incurred in the pursuit of a trade or business. Commissioner v. Flowers, 326 U.S. 465, 470 (1946). For purposes of section 162, generally "home" (or tax home) means the vicinity of the taxpayer's principal place of business or employment. Mitchell v. Commissioner, 74 T.C. 578, 581 (1980); Bixler v. Commissioner, 5 B.T.A. 1181, 1184 (1927). A taxpayer's residence, when different from the vicinity of his principal place of employment, may be treated as his tax home if the taxpayer's employment is "temporary" rather than "indefinite". Peurifoy v. Commissioner, 358 U.S. 59, 60 (1958).

It is axiomatic that, to be entitled to a deduction under section 162(a)(2), a taxpayer must have a tax home from which to be away. A taxpayer without a tax home is deemed to have "carried his home on his back" and is not entitled to the deduction because he was not "away from home". Hicks v. Commissioner, 47 T.C. 71, 73 (1966).

A primary consideration in determining whether a taxpayer has a tax home is whether or not the taxpayer incurs substantial, continuous, and duplicative living expenses. The duplication of expenses is a primary raison d'etre for

the deduction under section 162(a)(2). Barone v. Commissioner, 85 T.C. 462, 465-466 (1985), affd. without published opinion 807 F.2d 177 (9th Cir.1986). While the meaning of the phrase "substantial, continuous, and duplicative" may lie to some extent in the eyes of the beholder, we concluded in Barone v. Commissioner, supra at 466, that:

> Petitioner's total payment to his parents for the use of * * * their house amounts to $503 for the taxable year 1981. This token amount together with payments he made for his share of the electric and telephone bills does not constitute substantial, continuing living expenses. [Fn. ref. omitted; citation omitted.]

The facts of this case are similar to the facts in Barone.

Petitioner argues that our decisions in Gustafson v. Commissioner, 3 T.C. 998 (1944), and Ralston v. Commissioner, T.C.Memo. 1968-248, are controlling. We disagree. While the facts of Gustafson are somewhat similar, the reasoning of that opinion is no longer apposite. We noted in Hicks v. Commissioner, supra at 74, "a change in the judicial climate * * * has sapped the Gustafson opinion of much, if not all, of its vitality."

In Ralston the taxpayer incurred only minimal expenses, but there was a coalescence of other factors that suggested a different result. The taxpayer claimed that Louisville, Kentucky, was his tax home. He was a groom for a racing stable located in Louisville, but spent much of the year at various racetracks around the country. Part of that time, however, was spent at Keeneland Race Track in Lexington, Kentucky, near Louisville, and, when he was not on the racing circuit, the taxpayer was working at the home stable in Louisville. We concluded that:

> Where there has been a coalescence of place of abode and the performance of some work in the vicinity thereof for an employer who was based in the same vicinity, the courts have generally permitted a deduction for meals and lodging elsewhere. * * * [Ralston v. Commissioner, supra.]

Those factors are not present in this case.

In sum, we conclude that petitioner cannot claim that Boise, Idaho, was his home for the purposes of section 162(a)(2). [FN3] While he did spend his idle time there, the source of his employment had no connection with Boise. Moreover, petitioner's minimal financial contribution to his parents' home does not lead to the conclusion that he incurred substantial, continuous, and duplicative expenses.

To reflect the foregoing,

Decision will be entered under Rule 155.

FN1. All section references are to the Internal Revenue Code in effect for the year in issue, and Rule references are to the Tax Court Rules of Practice and Procedure.

FN2. Respondent concedes that petitioner is entitled to a deduction in the amount of $2,685 for miscellaneous expenses on Schedule A.

FN3. In James v. United States, 308 F.2d 204, 208 (9th Cir.1962), the Court of Appeals for the Ninth Circuit indicated that, while the existence of a tax home was a prerequisite to deducting total (emphasis in the original) traveling expenses, an itinerant taxpayer (without a tax home) might be able to deduct that portion of his traveling expenses attributable to the increased cost of meals and lodging associated with travel. Appeal in this case lies in the Court of Appeals for the Ninth Circuit. However, James was decided based on the language "the entire amount" in section 23(a)(1)(A) of the Internal Revenue Code of 1939 and that language has been removed from the statute by a 1962 amendment. Revenue Act of 1962, Pub.L. 87-834, sec. 4(b), 76 Stat. 960, 976-977. Furthermore, we need not decide whether the Court of Appeals for the Ninth Circuit would interpret the amended statute as it did in James, because petitioner, as in James, has not shown what portion of his traveling expenses are attributable to the increased cost associated with travel.